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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: MAY 30 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On May 8, 2009, United States Citizenship and Immigration Services (USCIS), Texas Service Center (TSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the TSC director (hereinafter the director) on June 20, 2009, but the director reversed his decision and revoked the approval of the petition on September 18, 2009. The petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a Senior Software Engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification.

On appeal, counsel contends that the beneficiary has a master's degree or a foreign degree equivalent to a U.S. master's degree. To demonstrate that the beneficiary has a master's degree or foreign equivalent degree, counsel submits the following evidence:

- [redacted]
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The evaluations submitted above state that:

1. [redacted]
2.

Further, counsel indicates that IEE, ECE, and FIS are all members of National Association of Credential Evaluation Services (NACES), a credible organization in which the AAO, at least in one decision [redacted], states that in order for an evaluation to be acceptable it must come from a member of NACES.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a foreign three-year bachelor's degree and a foreign two-year master's degree from universities in India. Thus, the issue is whether those degrees combined together are equivalent to a U.S. master's degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

1. Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, counsel relies on the academic evaluations issued by IEE, ECE, and FIS, three organizations which state that the beneficiary's two-year master degree from University of Pune, India, is equivalent to a master's degree from an accredited U.S. university. In response to the AAO's Notice of Intent to Deny (NOID) dated March 2, 2012 the petitioner submits another academic evaluation from FIS. The evaluation is signed by [redacted] on March 27, 2012. [redacted] in her evaluation states that the beneficiary has completed 161 semester credits (97 from his three-year bachelor's degree plus 64 credits from his two-year master's program), and based on the total accumulated credit, the beneficiary has the equivalent of graduation from high school plus a bachelor's degree and a master's degree in management information systems from a regionally accredited college or university in the U.S.

Counsel further argues that the minimum requirements for a Master's degree in the U.S. are 150 credits (120 from undergraduate study plus 30 from graduate program), the average being 154 credits (120 from undergraduate study plus 34 from graduate program), and the maximum being 162 credits. To support the assertions, counsel submits a list of accredited U.S. universities that offer a similar Master's degree in Computer Science and their course credit requirements for graduation. In this case, counsel states the beneficiary has accumulated 161 credits, and therefore, he has a foreign degree equivalent to a master's degree from an accredited U.S. university.

With respect to the Electronic Database for Global Education (EDGE) report, counsel states that the report is generic in nature and is not an evaluation of the beneficiary's educational credentials, and for those reasons, it carries no weight. Counsel additionally contends that the director's reliance on *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977), is misplaced for various reasons, namely:

1. It is not clear how many credits that the beneficiary in *Matter of Shah* had accumulated to obtain his bachelor's degree;
2. *Matter of Shah* does not stand for the blanket proposition that by definition a three-year undergraduate degree (for example even if it took 150 credits and included studying in Summer) from universities in India is not a U.S. equivalent bachelor's degree; and
3. The three-year comment was only *dicta*.

We note that even though all of the educational evaluations conclude that the beneficiary has the equivalent of a U.S. master's degree, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought, and it may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS

may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). We choose not to use the discretion in this case, as the opinions conferred by the academic evaluation companies (IEE, ECE, and FIS) differ from that given by EDGE.[2]

For this classification – advanced degree professional – the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year

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[2] As noted earlier in the AAO's NOID, EDGE provides a great deal of information about the educational system in India, and, while it confirms that the Master of Computer Management degree in this case is awarded to the beneficiary upon completion of three years of Bachelor of Science degree and two years of study in a master's program, it does not represent attainment of a level of education comparable to a U.S. Master's degree. The beneficiary's Master of Computer Management, according to EDGE, represents the attainment of a level of education comparable to a bachelor's degree in the United States.

degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary

[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

Here, we acknowledge that the beneficiary has a foreign degree equivalent to a U.S. baccalaureate degree, but we cannot sustain the appeal and approve the petition under the advance degree professional classification since the beneficiary does not have five years of progressive experience in the specialty. The record shows that the beneficiary has a total of three years and four months of progressive experience in the specialty (two years from [redacted] plus one year and four months from [redacted]. in [redacted]) as of the priority date.[4]

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate or the master's degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification.

As noted above, evidence of record reflects that the beneficiary's three-year bachelor's degree plus his two-year master's degree are equivalent to a U.S. bachelor's degree, not a U.S. master's degree. Because the beneficiary has neither (1) a U.S. master's degree or foreign equivalent degree, nor (2) a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

2. **Qualifications for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the

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[4] The priority date is the date of filing of the ETA Form 9089, which is August 14, 2008. The beneficiary, according to the ETA Form 9089, has worked for the petitioner since November 25, 2002 as a [redacted] The position offered as described in the ETA Form 9089 is [redacted] The beneficiary cannot gain qualifications for the position offered by solely relying on his work experience with the petitioner unless (a) he gained the experience in a position not substantially comparable to the position for which certification is being sought or (b) the petitioner can demonstrate that it is no longer feasible to train a worker to qualify for the position. *See* 20 C.F.R. § 656.17(i)(3). No evidence has been submitted to demonstrate that the two exceptions as outlined above apply in this case.

> domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, with respect to the minimum level of education and experience required for the proffered position, Part H of the labor certification reflects the following requirements:

H.4.	Education: Minimum level required: Master's.
H.4-B.	Major Field of Study: Computer Science.
H.5.	Is training required in the job opportunity? No.
H.6.	Is experience in the job offered required for the job? No.
H.7.	Is there an alternate field of study that is acceptable? Yes.
H.7-A.	If Yes, specify the major field of study: Engineering.
H.8.	Is there an alternate combination of education and experience that is acceptable? No.
H.9.	Is a foreign educational equivalent acceptable? Yes.
H.10.	Is experience in an alternate occupation acceptable? Yes.
H.10-A.	If Yes, number of months experience in alternate occupation required: 24.
H.10-B.	Identify the job title of the acceptable alternate occupation: Computer software development and/or consulting.

Based on the information above, we conclude that the position specifically requires the beneficiary to have at least a Master's degree in either Computer Science or Engineering and two years of experience in computer software development and/or consulting.

As noted above and earlier in the AAO's NOID dated March 2, 2012, the record does not reflect that the beneficiary has a U.S. master's degree or foreign equivalent degree. Thus, he does not meet the job requirements on the labor certification. For this reason, the petition may not be approved.

Moreover, section 205 of the Act, 8 U.S.C. § 1155, authorizes the U.S. Attorney General [now Secretary, Department of Homeland Security] to revoke the approval of an employment-based petition provided that the decision is based on good and sufficient cause. The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988). It appears that the director has erroneously approved the petition in June 2009. The director realized, after he approved the petition, that the beneficiary's master's degree is not comparable or equivalent to a U.S. master's degree. Therefore, the director's decision to revoke the approval of the petition is based on good and sufficient cause.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.